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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-922

MARY LOUISE GREEN PASCHALL, ET AL.,
Appellants,

VERSUS

CHRISTIE-STEWART, INC., ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF APPELLEES

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SUPPLEMENTAL STATEMENT OF CASE

Appellants' Statement of Case which appears at pages 5, 6, 7, 8 and 9 of their Brief filed herein has omitted certain dates and undisputed findings of fact which Appellees deem germane to the issues presented. These are as follows:

That the Resale Tax Deed of Appellees was filed for Record June 6, 1956, at 1:00 p.m. (Appendix pages 8 and 9).

That from the date of the recording of said Resale Tax Deed, Appellees have been in open, continuous,

visible, notorious, exclusive and hostile possession of said lands and premises, receiving all of the rents, profits and income therefrom. Jurisdictional Statement, Appendix B, Judgment of the District Court of Seminole County, paragraph (2), page XVII.)

That the action of Appellants to cancel and set aside the Resale Tax Deed of Appellees was not commenced until March 9, 1965 (Appendix page 7).

BRIEF AND ARGUMENT

ANSWER TO APPELLANTS' PROPOSITION I

THAT NO STATUTORILY ADEQUATE NOTICE OF THE ORIGINAL TAX SALE AND OF THE TAX RESALE WAS GIVEN APPELLANTS.

Appellants set out in their Brief *in toto* two Oklahoma Statutes, 68 Okla. Stat. 1951 § 382 and 68 Okla. Stat. 1951 § 432b, and contend that neither give adequate notice. Section 382 (original sale) is the notice requirement to be given by the County Treasurer if the ad valorem taxes are unpaid on the first day of April of any year. The sale which results from this publication notice does not divest the owner of his property, but merely creates a lien upon his land for the delinquent taxes. 68 Okla. Stat. § 388 (now 24316) specifically provides that the purchaser at such sale shall have only a lien on the land for the delinquent taxes. Thus, the original sale constitutes only a sale of the county's right to collect the ad valorem tax due on the property and no notice of any kind need be given the owners since no loss of property occurs at that time; the owners still fully retaining the right to redeem by payment of the taxes.

If the owner does not redeem the taxes within two years, the holder of the tax certificate or lien pursuant to the provisions of 68 Okla. Stat. § 451 (now 24323) may apply and receive a Tax Deed to the property. Appellants do not contend that the notice requirements of this statute do not fully meet all requirements of due process since written notice is required to be served upon the Owner of the land if he is within the State and also upon the person in possession of the land.

It was to the above notice and not the notice required by 68 Okla. Statutes § 382 (Resale) which Oklahoma Supreme Court directed its attention in the case of *Walker* v. *Hoffman*, 405 P.2d 57 (Okla. 1965), which is cited by Appellants in support of their First Proposition. This case also involved a Certificate Tax Deed and not a Resale Tax Deed.

The Appellants contend in their Brief the *Walker* v. *Hoffman* case, *supra*, is authority for the fact that served mineral owners are entitled to notice under 68 Okla. Stat. § 432b (Resale). This conclusion is not valid for two reasons: (FIRST) The language of the two statutes is in no way similar. Section 451 requires the applicant for a Tax Deed to cause written notice of such application to be served upon the owner of the land if within the State, and if not, by publication. The Supreme Court of Oklahoma in the case of *Martin* v. *Atkinson, Warren & Henley Co.*, 195 Okla. 19, 154 P.2d 945, held that the term "Owner" as used in Section 451 included the owner of an interest in the minerals and that notice must be served him before his rights can be extinguished by a Certificate Tax Deed. Section

432b requires that the notice contain *"the name of the owner of said real estate as shown by the last Tax Rolls in the office of the County Treasurer."* In *Herndon* v. *Pigg*, 190 Okla. 402, 124 P.2d 425, the Supreme Court of Oklahoma held the Legislature intended by this language that the Treasurer, in preparing resale notice, should look only to rolls in his office and should not be compelled to search records of County Clerk in determining in whose name ownership should be listed.

Further, the *Walker* case may be distinguished since Section 451 made notice a condition precedent to acquire the interest of the owner and thus an absolute estate in fee simple in the land. It was stipulated in the *Walker* case the notice required by the Statute was not given and, therefore, the interest of the severed mineral owner was not extinguished by the Certificate Tax Deed. The Court further distinguished the two Statutes citing *Jenkins* v. *Frederick*, 208 Okla. 583, 257 P.2d 1058, and *Cornelius* v. *Jackson*, 201 Okla. 667, 209 P.2d 166. (Appeal to United States Supreme Court was dismissed, 335 U.S. 906, 69 S.Ct. 412, 93 L.Ed. 440) when it discussed the Resale Statute stating:

> "Where a statute authorizes a lien for ad valorem taxes to be foreclosed by advertisement and sale by the County Treasurer, the proceedings thereunder relate to the land itself, rather than the owner thereof, and where the Statute provides for notice and gives the right to any person owning the land, or any interest therein, to redeem the land from taxes at any time before a Tax Deed is issued by the County Treasurer, the Statute affords due process of law, and the owner of the non-producing oil, gas and other mineral rights, whose interest in the land, in the name of the owner

of the surface, is assessed, advertised, and sold for delinquent ad valorem taxes, is given equal protection of the law and is not deprived of property without due process of law."

(SECOND) Under Section 451, an individual is seeking to divest the owner of his property, the applicant having theretofore paid the County for the delinquent taxes and having acquired a lien on the land. Thus it is not the County as the acting entity who is seeking to collect taxes which the Statute requires to give notice to the owner, but the individual asserting the lien.

Conversely, it is the County that is required to give notice under Section 432b (Resale) which still seeks to collect its taxes, having been required by law to acquire the lien upon the land in the event there were no bidders offering the amount due at the original sale. (68 Okla. Stat. § 391).

It should be noted the individual purchaser of a Tax Certificate is free to apply for a Certificate Tax Deed at any time after two years, limited only by a ten-year statute of limitations upon the certificate. Since the timing for the application rests wholly in the holder of the Tax Certificate, the burden of providing adequate notice and due process is imposed upon the individual applicant.

The time and the place of the resale is governed and fixed by statute on the second Monday in May. (68 Okla. Stat. § 432, now 24329 [Note in 1961 this date was changed to the second Monday in June]).

This Honorable Court in *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692, citing other authorities, stated:

> "All persons having property located within a State and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedures which they set up for those purposes. Proceedings for the assessment of taxes, the condemnation of land, the establishment of highway and public improvements affecting landowners are familiar examples."

The Oklahoma Supreme Court has likewise held that every person is charged under the law with notice and knowledge as to whether his taxes are paid and if they are not paid, he is charged with the knowledge that the land may be sold in the manner provided by law, and the owner is charged by law with notice of the time and place where such sales are required to be made. *Ponder* v. *Eby*, 194 Okla. 407, 152 P.2d 268.

No contention is made by Appellants they were not well aware of the ad valorem tax statute, which provided for the manner of sale and time and place of such sale if the taxes were not paid.

Mullane v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, relied on by the Appellants, did not, in Appellee's opinion, destroy or modify the traditional and accepted use of notice by publication nor did it require personal notice in order for due process to be accorded. Nor did the Court intend to relieve a person of the actual notice he was charged with under

the law in order to protect his property, which is clearly manifested by the Court, citing *Anderson National Bank* v. *Luckett, supra,* in the *Mullane* opinion.

Appellees submit the statutory requirements of notice imposed by the Legislature upon the State for due process in exercising its taxing power in the administrative collection of its taxes and those imposed upon the individual may vary and yet both be constitutionally sound.

Appellants in their Brief invite the Court's attention to an article in the Oklahoma Law Review, "Tax Sales and the Constitution," 20 Okla. L.R. 365, which is written by Appellants' counsel, William J. Legg. On page 376, in discussing the publication notice prior to the original sale, the author makes the following statement:

> "Also, under both old and new procedures, only a lien on the land results. Because this stage of the tax sale proceeding, would not be a taking, the due process notice requirements would not be applicable."

It would appear, therefore, the only issue before this Honorable Court is whether statutorily adequate notice was given at the Tax Resale.

ANSWER TO PROPOSITION II

THAT NO CONSTITUTIONALLY ADEQUATE NOTICE OF THE ORIGINAL TAX SALE AND OF THE TAX RESALE WAS GIVEN APPELLANTS.

In view of the admission by Appellants' counsel, that due process notice requirements would not be applicable to the original sale because no taking results therefrom, Appellees will confine their argument to the Resale Tax Notice.

Appellants' argument is based solely on this Honorable Court's decision in *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, and the subsequent cases cited in their Brief.

It is admitted in Appellants' Brief ad valorem taxes are payable exclusively by the surface owner and are so assessed. The Oklahoma Supreme Court has also held the owner of a severed mineral interest in order to protect his interest has the right to pay the taxes and assert an equitable lien against the surface owner. *Cochran* v. *Godard*, 182 Okla. 506, 78 P.2d 692. In addition, the mineral owner might purchase the delinquent taxes at any stage of the proceeding, and thereby assert the statutory lien arising from the original sale.

This Honorable Court in *Mullane* stated:

> "This Court has not hesitated to approve or resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning."

In Oklahoma, the County Treasurer has available in his records only the name and address of the surface owner. Appellants would like the Court to believe that the names and addresses of the severed mineral owners are readily available on the books of the "acting entity." This is not the case. It is true that the names of most of the severed mineral owners might be obtained from a search of the records of the County Clerk's office by checking from the time of the original patent to date, all deeds and mineral conveyances filed and indexed against a given property description.

The manpower required to conduct such a search covering each parcel of real property to be sold at a Resale is beyond estimation, and would not necessarily result in a complete list of mineral owners or their addresses since most conveyances do not disclose the addresses of the parties.

Oklahoma is a major producer of oil and gas. Being aware of this fact, its citizens have throughout the years reserved and conveyed minerals. It is the rule rather than the exception in Oklahoma, that most parcels of real estate have some or all of the minerals severed. Thus, if the County Treasurer were required to make a search of the records outside of his office, and then notify such parties personally, it might well turn out that hundreds or even thousands of notices would be required. The cost of postage alone could exceed the amount of tax.

Appellees respectfully suggest this Honorable Court carefully weigh and consider the burden it would place upon the County Treasurer and the State against the ex-

isting procedure which compels the holder of a severed mineral interest to inquire every two or three years in order to protect his interest.

The Resale Notice Statute was amended in 1965, and now requires in addition to publication, that notice be mailed to the owner as shown by the Tax Rolls in the office of the County Treasurer. It, therefore, appears the Legislature recognized how impractical and unreasonable it would be to require the County Treasurer to search beyond his own records.

Appellants argue the Oklahoma Supreme Court has recognized the changes in concept required by *Mullane* by its decision in *Bomford* v. *Socony Mobil Oil Co.*, 440 P.2d 713. This is quite true. The Court also recognized the practical problems which might result in attempting to apply those new concepts and principles to existing statutory procedures long employed and relied upon when it stated:

> "Mindful of our duty to guard against any attempt to upset settled titles by imposition of new requirements which did not exist before, we declare that all procedural modifications enunciated herein shall not be construed as invalidating the publication process in this case or in any case in which the trial Court's judgment shall have been rendered before this opinion becomes final."

Appellees submit the argument of Appellants is moot, since the record discloses the claim of Appellants is barred by the Statute of Limitations.

The Judgment of the trial court (Appendix B, in the Jurisdictional Statement, page XV), made a specific finding

that Appellees had been in adverse possession of the subject property since June 6, 1956, and that Appellants' claim was barred by the Statute of Limitations as provided by 12 Okla. Stat. Sec. 93 (3) and (6).

12 Okla. Stat. Section 93 (3) and (6) provides:

> "Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no other time thereafter;
>
> "(3) An action for the recovery of real property sold for taxes, within five (5) years after the date of the recording of the Tax Deed.
>
> "(6) Numbered paragraphs 1, 2 and 3, shall be fully operative regardless of whether the deed or judgment or the precedent action or proceedings upon which such deed or judgment is based is void or voidable in whole or in part, for any reason, jurisdictional or otherwise; provided that this paragraph shall not be applied so as to bar causes of action which have heretofore accrued, until the expiration of one (1) year from and after its effective date. (Laws 1949)."

The one-year Statute of Limitations cited in Appellants' Brief does not apply if the sale is void because statutory procedure was not followed.

The record further discloses, Appellees did assert possession to the mineral interest of Appellants, by the execution of an Oil and Gas Lease in November of 1963, approximately eighteen (18) months before any action was taken by Appellants to attack the Resale Tax Deed at issue, which had been of record almost nine (9) years.

This Honorable Court has consistently held the States may constitutionally impose Statutes of Limitations upon claimants in order to avoid the litigation of stale and vexatious claims. *Vance* v. *Vance*, 2 S.Ct. 854, 108 U.S. 514, 27 L.Ed. 808; *Atchafalaya Land Co.* v. *F. B. Williams Cypress Co.*, 42 S.Ct. 284, 258 U.S. 190, 66 L.Ed. 559; *Chase Securities Corp.* v. *Donaldson*, 65 S.Ct. 1137, 325 U.S. 304, 89 L.Ed. 1625; and *Kavanaugh* v. *Noble*, 68 S.Ct. 235, 332 U.S. 535, 92 L.Ed. 150.

The Oklahoma Supreme Court has not hesitated to impose the Statute of Limitations against a former mineral owner in cases involving Resale Tax Deed where the evidence established the holder of the Tax Deed had been in exclusive continuous possession for the statutory period. *Jenkins* v. *Frederick*, 208 Okla. 583, 257 P.2d 1058; *Colonial Royalties Co.* v. *Sitler*, Okla., 298 P.2d 1060.

Even if Appellees were to concede to the argument and theory of Appellants that due process was not accorded under the statutory notices given, the application of the same without regard to the Statute of Limitations would create total and utter chaos among those holding Tax Titles in the State of Oklahoma. Appellants' theory is the sale is void *ab initio* and the limitation period would never run.

To embrace Appellants' concept would open to attack every Tax Certificate and Resale Tax Deed issued in the State of Oklahoma since Statehood. The flood of litigation would inundate the Courts, deprive owners of their homes, and jeopardize the County in the collection of ad valorem taxes.

In *Schroder* v. *City of New York*, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed.2d 255, 89 A.L.R.2d 1398, this Honorable Court clearly sets forth the rule established in *Mullane* when it stated:

> "The General Rule that emerges from the Mullane Case is that Notice by Publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."

The record is undisputed that the County Treasurer does not have the names and addresses of severed mineral owners in his records since such interest is taxed against the surface owner. To require the County Treasurer to employ a staff of attorneys or other qualified personnel to engage in a title search of the voluminous records of the County Clerk's office would create an unconscionable burden upon the County without due regard for the practicalities and peculiarities of the case.

CONCLUSION

The Publication Notice given which contained the name of the owner as disclosed by the records of the County Treasurer, but not the names of the severed mineral owners whose names were not known or very easily ascertainable, under the circumstances, constituted due process of law. Accordingly, the Resale Tax Deed should be declared valid and the judgment of the Supreme Court of Oklahoma affirmed.

Respectfully submitted,

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July, 1973

CERTIFICATION OF SERVICE

I hereby certify that the following, who are all the parties required by law to be served in the above case, were this day each mailed three (3) copies of the foregoing Brief of Appellees, postage prepaid:

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